

# WHEN WAS DOJ GOING TO GET AROUND TO TELLING US ABOUT AWLAKI? PART ONE

Let me start by saying that I'm all in favor of DOJ releasing the information it has on Anwar al-Awlaki. I'm not complaining that they have released it. I'm just puzzling through why they have treated it as they have thus far. In this post, I'm going to review how the government came to tell one story at Umar Farouk Abdulmutallab's trial last year, and another one—one that implicates Awlaki—last Friday. In a follow-up post, I'm going to explore why DOJ has refused to lay out the case they have against Awlaki before (including last October).

## DOJ Hid Awlaki in October

As I have noted, when DOJ made its opening argument in Umar Farouk Abdulmutallab's trial on October 11, 2011, prosecutor Jonathan Tukul said that Abdulmutallab told the FBI on Christmas Day 2009 that a guy named Abu Tarak had ordered him to attack the US.

And Abu-Tarak gave him the direction.

Remember, I said there were only three parts to the plan, he had to blow up a plane, it had to be a U.S. airliner and it had to take place over U.S. soil. Abu-Tarak reported that way, make sure it's a U.S. aircraft, make sure it takes place over the United States.

And then the defendant told the FBI that on approximately December 6 or 7 he received the bomb from Abu-Tarak in Yemen. [my emphasis]

In the narrative they released last Friday, they said Awlaki gave that order.

Although Awlaki gave defendant operational flexibility, Awlaki instructed defendant that the only requirements were that the attack be on a U.S. airliner, and that the attack take place over U.S. soil. [my emphasis]

Now, the explanation I've gotten is that Abu Tarak is Awlaki, or rather, that Abu Tarak is an alias for Awlaki.

But assuming that explanation is correct (I'm not entirely convinced), it still permits several possibilities:

- Abdulmutallab just made the name up in an effort to hide Awlaki—and, as we'll see below—bomb-maker Ibrahim al Asiri's role (but the FBI described Abdulmutallab as bragging about his ties to Awlaki and al Qaeda in his first interrogation)
- The government already knew Abu Tarak was an alias Awlaki used (which doesn't seem to be the case, since early reporting says Awlaki blessed the op, but didn't say he was the cleric who ordered it)
- Abdulmutallab later told the FBI that Abu Tarak was Awlaki's alias
- Abdulmutallab never confirmed Abu Tarak was an alias for Awlaki, but in later interrogations said that Awlaki had given the

order to strike the US and therefore the government concluded that Abu Tarak must be an alias

(Here are two more of the most comprehensive stories based significantly on Abdulmutallab's initial confession to give more of a sense of what they knew from Abdulmutallab's first confession, on which Tukul's opening was based.)

Dr. Simon Perry's statement seems to rule out some of those possibilities, given that, even after reading redacted versions of 18 or 19 of Abdulmutallab's interrogation reports, Perry treats Abu Tarak and Awlaki as different people: he describes Abu Tarak as someone besides Awlaki who significantly influenced Abdulmutallab.

Aulaqi was not the only influential fundamentalist in UFAM's life. While residing at Abu Tarak's residence in Sana, Yemen he was mainly confined to his residence and discouraged from any communication with the outside world (phone, email). During this period, UFAM spoke regularly with Abu Tarak and three other individuals who visited him daily, speaking with them about Jihad and martyrdom. [my emphasis]

Given Perry's apparent understanding that Abu Tarak and Awlaki are different people, either Abdulmutallab never clearly said that Abu Tarak and Awlaki were the same person, any statement he made to that effect was redacted in the copies Perry read, or Perry wasn't given the interrogation where Abdulmutallab made such a statement. (Note, however, that the only reference Perry makes to Abu Tarak cites the Christmas Day confession, so it's possible Abdulmutallab never mentioned him again.)

With all that in mind, let's review how Tukul told the story about Abu Tarak at the trial but is now telling a story about Awlaki at

sentencing.

DOJ committed in August not to use information from “plea bargains”

Back in August, Abdulmutallab tried to mount a defense by making all of his confessions, one way or another, inadmissible. He wanted his initial confession thrown out because he had not received a Miranda warning, he wanted statements he made at UM Hospital thrown out because he was drugged up, and he wanted the statements he made while at Milan (pronounced My-Lan) Prison—all of them—excluded because they were made as part of a plea negotiation.

Defendant ABDULMUTALLAB met with government agents on numerous occasions at the Milan Correctional Facility. The government intended to obtain incriminating statements from Defendant regarding the alleged incident on December 25, 2009. In addition, the government engaged in plea negotiations with the Defendant during the meetings. Before the meetings began, the government agents verbally agreed that they would not use any statements Defendant made, against him. Defendant relied on the government’s representation – as officers of the court – and made incriminating statements. See *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995) (the government can grant the defendant varying degrees of immunity in an informal agreement). Allowing the government to use these statements at trial will violate the government’s agreement with Defendant.

In response to this motion, the government said it would not use any of these statements “at trial,” so the judge should deny his motion as moot, which she did.

Defendant also filed a separate motion

to suppress statements made to agents on other dates. R.59: Motion to Suppress Statements Made to Government Agents at the Milan Correctional Facility. The government will not seek to offer those statements at trial either, and therefore that motion should be denied as moot.

So basically, the government committed, on August 26, 2011, not to use anything Abdulmutallab said while at Milan during "the trial." That means they were confident they could rely solely on Abdulmutallab's initial confession to convict him, which seems like a pretty safe bet.

It appears that the narrative released on Friday includes at least some information from those Milan interrogations, because Abdulmutallab's standby counsel objected to their inclusion in the presentence investigation, and the government treats those paragraphs of the presentence investigation and their own sentencing narrative together in a footnote responding to his objection.

As detailed extensively in the Presentence Investigation Report at ¶¶ 13-24 and in the Supplemental Factual Appendix [the government narrative],<sup>2</sup> defendant was deeply committed to his mission, seeking out and finding Al Qaeda and Anwar Awlaki, volunteering for a martyrdom mission, and then becoming involved in planning and training for a significant amount of time.

<sup>2</sup> Defendant states that the objected-to paragraphs contain "information obtained during plea negotiations in this matter and can not at this stage be used against him, for sentencing purposes." Assuming arguendo that the debriefings at which the statements were made were in fact "plea negotiations," defendant's argument precisely

misses the point. The admissibility of plea negotiations is controlled by Federal Rule of Evidence 410, which is inapplicable at sentencing. Fed. R. Evid. 1101(d)(3); see also 18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence.”).

So the government committed not to use this information “at trial,” but is using it in sentencing.

The “plea bargain” information names Awlaki

That said, there doesn’t appear to be a lot that comes from those interrogations. If you compare the government’s narrative with what Tukul said in his opening, just about all the facts appear in the opening, meaning the government either got them from forensics (like the construction and ingredients in the bomb) or from Abdulmutallab’s initial confession.

The exceptions are the references to texts between Awlaki and Abdulmutallab (though early reporting said the NSA found some of this communication), the names of Samir Khan and Ibrahim al-Asiri (though they had the latter from his fingerprint on the bomb, and Tukul did mention the fingerprint), the description of Asiri, not Abu Tarak, training Abdulmutallab on the bomb, the description of Awlaki, not Abu Tarak, ordering the attack on the US, and this information:

Thereafter, defendant was picked up and driven through the Yemeni desert. He eventually arrived at Awlaki’s house, and stayed there for three days. During that time, defendant met with Awlaki and the two men discussed martyrdom and jihad. Awlaki told defendant that jihad

requires patience but comes with many rewards. Defendant understood that Awlaki used these discussions to evaluate defendant's commitment to and suitability for jihad. Throughout, defendant expressed his willingness to become involved in any mission chosen for him, including martyrdom – and by the end of his stay, Awlaki had accepted defendant for a martyrdom mission.

In short, while the initial effort to rule the Milan interrogations inadmissible may have been a more general defense strategy, here it appears to be an effort to minimize Abdulmutallab's connection to Awlaki.

The government even admits, in the guise of proving that Abdulmutallab was engaged in international terrorism, that it used this additional information largely to implicate Awlaki.

The Supplemental Factual Appendix is included in order to provide the Court with additional information regarding "the nature and circumstances of the offenses," particularly Count One. It provides the Court with relevant details regarding other terrorists with whom defendant interacted overseas as part of this plot, including Anwar Awlaki.

The government has a reason ostensibly tied to Abdulmutallab's sentencing, but it's pretty clear this is about providing evidence against Awlaki, not Abdulmutallab. Abdulmutallab would surely be sentenced to multiple life sentences in any case, as he will be if Judge Edmunds decides to ignore this detail too.

Why play hide-and-seek with Awlaki?

I can think of two explanations for why the government would use this approach.

The first is that Abdulmutallab's admissions

really were problematic from an evidentiary standpoint. Either his admissions about Awlaki were not as clear cut as the government now claims—and might have been successfully discredited at trial—or the government really did extract them under the guise of a plea bargain that Abdulmutallab never received.

Which makes you wonder why his court-appointed lawyers (the ones he fired in September 2010, citing a conflict of interest) didn't advise him to sign the Kastigar letter the government offered. Abdulmutallab's lawyer say the government offered him one.

Moreover, the government presented Defendant with a signed Kastigar letter before Defendant made incriminating statements.

But the government says Abdulmutallab, with the advice of counsel, did not sign it.

However, no proffer agreement was ever signed by Defendant Abdulmutallab, who, after consultation with his then-counsel, chose to speak to agents without signing such an agreement.

What were the terms of these interrogations, then, and what kind of undelivered promises did the government make before Abdulmutallab implicated Awlaki?

This article laying out aborted DOJ plans to charge Awlaki—written the day after Abdulmutallab fired his lawyers, citing conflict of interest—suggests that the government tried, but never convinced Abdulmutallab to testify against Awlaki.

The best case scenario for the government would be for Abdulmutallab to plead guilty. He has already told the FBI that al-Awlaki was involved in the airliner bomb plan, and a plea deal would allow Abdulmutallab to become a

witness against him. But Abdulmutallab, who fired his lawyers Monday and was given approval to represent himself, has yet to strike a deal and would probably seek a reduced prison sentence in exchange for his help.

In other words, this sentencing hearing is the opportunity to achieve legally what they never managed to achieve earlier: getting Abdulmutallab to make their case against Awlaki for them. Without, it should be said, the opportunity to challenge the evidence.

I'll cover the other reason DOJ may have hidden Awlaki so long in a follow-up post.